SUPREME COURT
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No. 94-1838

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

OXY USA INC.,

Petitioner,

V.

CONTINENTAL TREND RESOURCES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for The Tenth Circuit

SECOND SUPPLEMENTAL BRIEF

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Pursuant to Supreme Court Rule 15.8, Respondents Continental Trend Resources, Inc.; Harold G. Hamm, Trustee of the Harold G. Hamm Revocable Inter Vivos Trust; Gary H. Wright; Cindy Wright; Jeffrey B. Hume; and Farrar Oil Company (collectively "Continental"), respectfully submit this Second Supplemental Brief in opposition to the Petition for Writ of Certiorari of OXY USA Inc. ("OXY") to address the effect of the Court's decision in *BMW of North America, Inc. v. Gore*, __ U.S. __, 1996 WL 262429 (May 20, 1996). Continental respectfully submits that this Court's holding in *BMW* demonstrates there is no need nor basis to grant certiorari in this case. *BMW* did not involve the type of reprehensible, fraudulent, intentionally tortious conduct present here. As the Court observed in *BMW*, punitive damages are properly awarded, and in significant amounts, in cases of intentional tort, affirmative fraudulent acts and deceit, conversion and affirmative fraudulent trade practices. *BMW*, 1996 WL 262429 at *8-*10. *See also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (Kennedy, J., concurring). For the reasons set forth herein, Continental respectfully submits that the decision in *BMW* mandates the denial of OXY's Petition for Writ of Certiorari.

I.

THE *BMW* CASE DOES NOT CHANGE THE PROCEDURAL DEFICIENCIES CONTAINED IN OXY'S PETITION

As Continental demonstrated in its Brief in Opposition to Petition for Writ of Certiorari, the questions presented by OXY's Petition were not raised and/or were waived in the proceedings below. *See* Brief in Opposition to Petition for Writ of Certiorari, pp. 1, 5-7. As such, this Court's decision

in *BMW* has no impact on many, if not all, of OXY's arguments. On the only question arguably preserved -- whether the verdict is excessive under the unique facts of this case -- *BMW* makes clear that the decision below was plainly correct, the appropriate guideposts were applied, and the right result was reached.

II.

THE TENTH CIRCUIT AND THE DISTRICT COURT PREVIOUSLY APPLIED THE IDENTICAL GUIDEPOSTS IDENTIFIED IN *BMW* IN REACHING THE RIGHT RESULT

This Court in *BMW* reaffirmed its prior decision in *TXO* that a punitive damage award violates the due process clause of the United States Constitution only when it can fairly be categorized as "grossly excessive" in relation to the state's legitimate interests in punishing unlawful conduct and deterring its repetition. 1996 WL 262429 at *6-*8; *see also TXO*, 509 U.S. at 456. The determination of whether an award is "grossly excessive" in light of a state's legitimate interests of punishment and deterrence of intentional wrongdoing occurring within its borders is reviewed in part by the application of "three guideposts." 1996 WL 262429 at *8. These guideposts include the degree of reprehensibility of the defendant's conduct; the disparity or lack thereof between the harm or potential harm suffered by the plaintiff and the punitive damage award; and the difference between the punitive damage award and sanctions for comparable misconduct (*i.e.*, civil or criminal penalties that could be imposed). *Id.*

Here, the United States Court of Appeals for the Tenth Circuit and the district court have already carefully

placed the facts of this case under the microscope of these three guideposts (and others previously identified by this Court in *TXO* and *Haslip*[1]) in determining that the award was well within the parameters of constitutional reasonableness.

For example, Oklahoma, unlike Alabama, had a "cap" on punitive damages which could be lifted only where a trial court found by clear and convincing evidence that the defendant's conduct was reprehensible and evinced oppression, wanton and intentional disregard for a plaintiff's rights. The district court made such a finding in this case. (Pet. App. 41a-44a). The trial court then conducted an exhaustive 18 month post-trial review of the verdict applying the identical guideposts identified by this Court in *BMW* and resulting in express findings of the type of reprehensibility which this Court identified in *BMW* as supporting a substantial punitive award. (*Compare* Pet. App. 33a-63a with *BMW*, 1996 WL 262429 at *8-*10.) Notably, OXY has not challenged the finding of clear and convincing evidence to lift the cap. The Tenth Circuit also applied the relevant guideposts and found "several factors that support the extremely large punitive damage award." (Pet. App. 21a.) The Tenth Circuit specifically identified multiple instances of the reprehensibility of OXY's conduct (*compare* 1996 WL 262429 at *8-*10 with Pet. App. 11a, 14a-22a); compared the harm and potential harm suffered by Continental (coupled with the profit incentive of OXY) with the punitive award (*compare* 1996 WL 262429 at *10-*11 with Pet. App. 15a-22a); and focused on the difference between the punitive remedy and sanctions for comparable misconduct (*compare* 1996 WL 262429 at *11-*12 with Pet. App. 19a.)

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[1] *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Thus, by utilizing the same guideposts identified by this Court in the *BMW* case (and as further identified in *TXO* and *Haslip*), the Tenth Circuit applied "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" (*BMW*, 1996 WL 262429 at *8) and found that OXY's intentional, reprehensible conduct warranted a substantial penalty. Because the lower courts have already applied the constitutional principles held by this Court in *BMW*, *TXO* and *Haslip* to be relevant, and because the facts in this case amply support the lower court's decision, there is no basis to grant certiorari or for the Tenth Circuit to reconsider its opinion in light of *BMW*.

III.

APPLICATION OF THE THREE GUIDEPOSTS DEMONSTRATES THAT THERE IS NO REASON TO GRANT CERTIORARI

A. DEGREE OF REPREHENSIBILITY

In *BMW*, this Court stated that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 1996 WL 262429 at *8. The Court explained that "trickery and deceit," *see also TXO*, 509 U.S. at 462, are, for example, more reprehensible than negligence, 1996 WL 262429 at *8; and that conduct evidencing intentional malice, intentional economic injury caused through affirmative acts of misconduct, or intentional acts of misconduct when the target is financially vulnerable all warrant a substantial penalty. *See* 1996 WL 262429 at *8. The Court cited other factors such as repeated engagement in prohibited conduct, deliberate false statements, acts of affirmative

misconduct, and concealment of evidence or improper motive as being material factors supporting a substantial punitive damage award. *See* 1996 WL 262429 at *8-*10.

Focused on these considerations, *BMW* stands in stark contrast to the facts in this case. Unlike *BMW*, all of the factors identified by this Court as being relevant to support the constitutional validity of a large punitive damage award are present. Here, OXY's misconduct meets all of the indicia of reprehensibility. Both the district court and the Tenth Circuit relied on a record that included a deliberate pattern of overt and affirmative instances of egregious misconduct directed at both Continental and other victims. *See* Respondents' Brief, pp. 2, 3, 23-30; Pet. App. 11a, 14a-22a, 39a-40a, 47a-57a. OXY repeatedly used trickery, deceit and affirmative acts of fraud in conducting its plan for profit. *Id.* OXY's misconduct was lengthy in duration. *Id.* OXY's upper management and attorneys orchestrated the misconduct and were aware of the harm that the conduct caused and was likely to cause. *Id.* OXY knowingly testified falsely at depositions and falsified and altered documents in an attempt to conceal its motive and wrongdoing. *Id.*

The record is replete with evidence of OXY's reprehensible misconduct. It included shutting in other producers' wells to prevent them from selling gas in the free market; repeated acts of fraud on both Continental and on third parties; devising an overall "plan" to prevent Continental and other producers from selling their gas in the free market; intentionally breaching contracts by impermissibly charging Continental and other producers millions of dollars in gathering fees not allowed under the subject contracts; asserting sham contract rights; falsifying and altering documents to cover up OXY's liability; lying to third parties;

attempting to steal Continental's gas without paying for it to induce Continental to change its position; and filing sham lawsuits against third parties who tried to do business with Continental.

Thus, unlike the facts in *BMW*, the Tenth Circuit observed that in this case there was "voluminous evidence that OXY engaged in oppressive and coercive behavior that interfered with plaintiffs' present and prospective contracts; the consequences of such unchecked behavior could be disastrous." (Pet. App. 21a-22a.)

. Similarly, in this case, contrary to the facts in *BMW*, both the district court and the Tenth Circuit expressly relied on a record showing that OXY's top level executives engaged in a deliberate plan of trickery and deception, orchestrated by its legal department, together with findings that OXY's conduct was reprehensible, malicious and fraudulent. *See* Respondents' Brief, pp. 2-3, 23-30; Pet. App. 11a, 14a-22a, 39a-40a, 47a-53a. Unlike *BMW*, the pattern of misconduct here was not rare or isolated, but rather occurred over a period of several years involving literally thousands of contracts and hundreds of producers.

B. RELATIONSHIP OF ACTUAL AND POTENTIAL HARM TO PUNITIVE DAMAGES

The second indicium cited by this Court in *BMW* in the constitutional calculus is the inquiry concerning the reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred. 1996 WL 262429 at *10-*11; *see also TXO*, 509 U.S. at 460; *Haslip*, 499 U.S. at 21. In *BMW*, the Court specifically contrasted

the holding in *TXO* -- wherein it relied on the difference between the $10 million award and the harm to the victim that would have ensued if the tortious plan had succeeded, making the relevant ratio not more than 10 to 1 -- to the facts in *BMW* where the award by the Alabama Supreme Court of $2 million in punitive damages to Dr. Gore was 500 times the amount of actual harm as determined by the jury with no "additional potential harm by BMW's nondisclosure policy." 1996 WL 262429 at *10-*11. The Court found that the disparity [in *BMW*] is "thus dramatically greater than those considered in *Haslip* and *TXO*." 1996 WL 262429 at *11. Emphasizing that there is no mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable, the Court reaffirmed its prior holdings in *Haslip* and *TXO* that a general concern of reasonableness enters into the constitutional calculus. 1996 WL 262429 at *11. The fact that the 500 to 1 ratio in *BMW* "raise[d] a suspicious judicial eyebrow," 1996 WL 262429 at *11, *see also TXO*, 509 U.S. at 482 (O'Connor, J., dissenting), coupled with the lack of reprehensibility of BMW's conduct made the award in *BMW* grossly excessive.

Here, however, the actual and potential harm coupled with OXY's profit incentive was huge. OXY tendered evidence that there were literally hundreds of producers and up to 6,000 contracts involved in its recidivist scheme. (Resp. App. 2a, ¶ 12, Pet. App. 15a.) The record here, like that in *TXO*, shows specific evidence of OXY's wrongdoing to others. The Tenth Circuit found (as in *TXO*) that OXY's tortious conduct directed towards Continental was but a part of pattern, practice and plan of deception and intentional wrongdoing. The record evidenced a situation where Continental was financially vulnerable. OXY's actions not only pushed Continental's business to the verge of collapse, but if

OXY's plan had been ultimately successful, Continental would have lost its business and been harmed by literally millions of dollars.

The record also showed that prior to trial, OXY argued it had been damaged by over $7 million just by the small amount of gas Continental had been able to take off the Redman System which, if OXY's plan had been successful, would have been a direct loss to Continental. At trial and on its motion for new trial, OXY continued to assert that its damages were at least $4.25 million. Further, by preventing other gas from going to the free market, OXY's profit incentive was large indeed. As the Tenth Circuit noted, the 6,000 contracts involved also supported the conclusion that there was potential widespread injury and illicit profit. (Pet. App. 19a-20a.)[2] As part of its profit incentive, OXY also impermissibly charged "gathering fees" on some of these contracts ranging anywhere from 7¢ to 29¢ per Mcf for a period of over 5 years.

Thus, like *TXO*, the ratio here between actual and potential harm, coupled with the profit incentive to the punitive award, was actually less than 10 to 1. Such a ratio -- especially when viewed in the context of the reprehensible conduct of OXY -- represents a "reasonable relationship" between the punitive damage award and the actual and potential harm involved.

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[2] Unlike the facts in *BMW*, there is no evidence in the record that OXY's misconduct against other producers involved states other than Oklahoma. Further, the Court reiterated in *BMW* that other misconduct is relevant in determining the degree of reprehensibility involved. 1996 WL 262429 at *7 n.21.

C. SANCTIONS FOR COMPARABLE MISCONDUCT

A third indicia cited by this Court in *BMW* is sanctions for comparable misconduct. 1996 WL 262429 at *11. Continental has previously shown that the Federal Organizational Sentencing Guidelines exact similar penalties for conduct causing only economic harm which take into account the seriousness of the offense, the culpability of the organization, the necessity to remedy the harm caused, the pecuniary gain to the organization, the pecuniary loss from the offense, the size of the organization and the level of management involved. *See* 18 U.S.C. Appx. § 8 *et seq*. Under these factors and taking into account the amount of money involved and the other facts identified in Continental's Brief in Opposition, OXY's multiple offenses could have conservatively generated tens of millions of dollars in fines. Further, the Tenth Circuit compared this award to similar cases of intentional wrongdoing and found that under like circumstances, substantial verdicts have been entered and approved. (Pet. App. 19a-20a).

CONCLUSION

In *BMW*, this Court reiterated that it is not prepared to draw a bright line marking the limits of a constitutionally acceptable punitive damage award. 1996 WL 262429 at *13. The majority opinion found, however, that unlike the facts in *TXO* and *Haslip*, it was fully convinced that "the grossly excessive award imposed in this case transcends the constitutional limit." *Id.*

In contrast to *BMW*, this case has previously been reviewed under the pertinent guideposts and contains all of

the indicia identified as relevant by this Court to support a large punitive damage award. The Tenth Circuit has previously applied the relevant guideposts and found the existence of the types of reprehensible conduct identified in *BMW* as being necessary to impose a substantial punitive damage award. Therefore, this Court's decision in *BMW* demonstrates that there is no basis to grant OXY's Petition for Certiorari or to remand this case for reconsideration in light of *BMW*, and Respondents respectfully submit that the Petition be denied.

Respectfully submitted,

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